LIFE INSURANCE—POLICY HOLDER'S RIGHT TO PARTICIPATE IN SURPLUS.—No title to any part of the surplus of a mutual insurance company is held to belong to a policy holder in the case of *Greeff* v. *Equitable Life Assurance Society* (N. Y.), 46 L. R. A. 288, when no distribution has been made of the surplus by the officers or managers of the company, and the policy provides that the member shall be entitled to participate in the distribution of the surplus according to such principles and methods as may be from time to time adopted, which are expressly ratified and accepted by him.

COMBINATION IN RESTRAINT OF TRADE—PURCHASE OF COMPETITORS' BUSINESS.—Contracts among independent and unconnected manufacturers looking to the control of the price of their manufacture by limitation of production, by restrictions on distribution, or by express agreements, are held, in *Trenton Potteries Co.* v. *Oliphant* (N. J.), 46 L. R. A. 255, to be opposed to public interest and unenforceable. But it is held that courts would be obliged to recognize and enforce contracts for the purchase by an individual manufacturer of the business of his competitors even to the last one, although such purchases tend to eliminate competition and the last purchase would completely exclude it, at least for a time.

REHEARINGS—DECISIONS UPON POINTS NOT RAISED BY COUNSEL—SLANG.—The case of *Eclipse Oil Co.* v. *South Penn. Oil Co.* (in the Supreme Court of Appeals of West Virginia, 34 S. E. 923), was evidently a warm one—warm not only as between the parties to the record and their respective counsel, but also as between court and counsel. In the course of the opinion the court expressed itself in a manner that cannot fail to be interesting to the bar at large.

The case was one of unusual difficulty, involving the construction of an executory oil lease, doubtless of substantial value, providing for its surrender at any time without payment of rent or fulfillment of any of its covenants on the part of the lessee. Though the able counsel in the proceeding had not raised the point nor made the contention in any way, the court held that the lease created a mere right of entry at will, terminable by the lessor at any time before execution by the lessee, and that the execution of a second lease and possession thereunder was such a termination and avoided the first lease. Citing *Cowan* v. *Iron Co.*, 83 Va. 347.

The court in the passage presently to be quoted concedes the delicacy and importance of the legal issues involved. It is not the purpose to express here an opinion upon them. Judge Brannon filed a vigorous dissenting opinion, which he says that he did not have time to elaborate, and in which he described the judgment of his associates as making of the lease "a mere shadow, conferring practically nothing, because terminable the week after its date . . . . an airy nothing to perish at any moment at the lessor's will." It is desired here only to call attention to certain utterances of the court upon the points above indicated and upon which there was no expressed dissent.

A judgement of affirmance was first rendered November 28, 1899, and a petition for a rehearing filed by counsel for appellant company. We have not had an opportunity of examining this, but cannot doubt that it contained fuel sufficient in amount and quality to generate the degree of temperature (F.) indicated by passages of the opinion filed February 5, 1900, refusing a rehearing.

Said Dent, P., speaking for the court:

"In their petition and argument for a rehearing, plaintiff's counsel earnestly urge at least six several reasons why a rehearing should be granted in this case, with such force and sincerity as compel a careful consideration of them necessary; and, if any of them are well founded in law, a rehearing should follow as a matter of course. If they are all plainly untenable, then the rights of the appellee to have a speedy end of this litigation should prevail over any disposition the court or its members may entertain of according to the attorneys the privilege of re-argument for their own or their client's satisfaction.

"The first position is that the court decided the case on a point not fairly arising on the record, in total disregard of points raised in argument by counsel on either side, and fairly arising on the record. This presents at once the question, what is the point fairly arising upon the record which was decided by the circuit court, and then brought to this court to be reviewed by it? It was the dissolution of the plaintiff's injunction. And this is the sole point fairly arising on the record presented for the consideration of this court, and the question is, did the circuit court err in dissolving the injunction? The circuit court's conclusions may be right, and its reasons therefor wholly wrong; yet this court will never reverse a right decision because the reasons advanced in support thereof may be baseless. It is the duty of this court to affirm the decree, if the record justifies it, notwithstanding that the circuit court and the counsel may be laboring under an entire misapprehension as to the true merits of the controversy or the questions involved. Nor do the reasons by which the circuit court was actuated anywhere appear in this record. Counsel have seen fit to have an entertaining contest over what they consider to be the reasons by which the circuit court was controlled in reaching its conclusion. This court, however, is not a moot court, and cannot be governed by the consent or argument of counsel, but it must administer justice as the very right is made to appear from self-inspection of the record. This is the law, and there is no decision of any court to the contrary. . . . . It is not the opinion of counsel as to what they consider, agree or argue may be the points in issue, either in their petitions or briefs, but what the record itself discloses, that the court must decide. . . . . Counsel who are presumed to be fully advised of the law have the right to set up and knock down as many straw propositions as they please, but they cannot compel the court to follow their example, or require it to be bound by their conclusions. Neither can they compel the court to enter into the discussion of propositions of law not necessary for the decision of the points of error presented to the court for its determination. This court must presume that the circuit court was controlled by the true legal reasons justified by the record for its conclusion, rather than by insufficient ones presented by the counsel in argument. Counsel undoubtedly confound the points fairly arising on the record with the legal reasons to be given in support of the decisions of such points. . . . . This court has not held, nor could it possibly do so, that a wrong legal reason given for a right decision of a point presented would render such decision erroneous, and that it would be reversed and sent back that the court might correct its reasons to correspond with its conclusion. . . . . This court is in duty bound to consider any questions of law relating to the point in issue, whether mentioned or overlooked by counsel, without notice to them; and in rule 5, sec. 4, of the long-established rules of this court (23 W. Va. 823), the

court gives notice that it will notice any point of error, whether assigned or not. This is its legal duty, without regard to any rule on the subject. The court sits to administer justice, and not to teach or be taught law. When the question is a plain, legal one, it is not incumbent on the court to call counsel's attention to it, or request argument concerning it; for the very reason that argument is not necessary in its determination. The court must be presumed to know some of the elementary principles of law, and capable of passing thereon without the assistance of counsel. . . . .

"On inspection of the lease for construction, it [the court] finds it plainly invalid for other reasons than those asserted; thus sustaining the conclusions of the circuit court. This it was its duty to do, it matters not how unfavorably such action may impress the defeated litigant and counsel. That the decision is just and in accordance with law, conscience and duty, should be a sufficient shield to ward off the pointed arrows of criticizing sarcasm, though poisoned with the malevolence of defeat. The clause of the lease on which counsel thinks this controversy hinges is a very doubtful one, susceptible of as many constructions as minds. . . . . Such being the case, it is far better to uphold the conclusion of the circuit court by legal propositions and application thereof to this lease, about which there can be no doubt except in minds warped and biased by some personal interest."

There is much in the foregoing to commend itself to counsel for a losing side. It is in substance an appeal for greater temperateness of judgment by those who are inclined to deny to a court the liberty to follow any line of reasoning other than that marked out by counsel. A wholly favorable judgment upon the opinion, however, is rendered difficult by the following passage:

"The draftsman of this (lease) evidently wanted to place the lessee in condition to surrender the lease at any time without being obliged to pay the commutation money or other rental. It may have been through ignorance. But, ignorance or not, he dug the pit and his friend fell into it. Many do likewise. He is not the only pebble."

The use of slang in a judicial opinion may be thought to give point, but it is not dignified nor to be commended. The last sentence should be omitted in the official report of the case. In any event, if slang is to be used, it should not be mutilated by incompleteness; the entire expression should be quoted, and when the quotation is from a topical song, variety and interest would be added if the music were supplied with the words.

It is not difficult to imagine the following as a legitimate outgrowth of the practice:

"DOE v. ROE—Supreme court of Porto Rico.

Per Curiam: Counsel for appellant has suggested eleven grounds of error in the judgment complained of, but it will not be necessary to examine the last ten, inasmuch as

'He guessed just right the very first time.'

Vide 'Runaway Girl,' Act II, Sec. 3.

Judgment Reversed."

G. B.